

May 31, 2007

GLORIA L. FRANKLIN, CLERK
U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA



Signed and Filed: May 29, 2007

Dennis Montali

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

THEODORE A. KOLB,
Debtor.

ROBERT M. CASSEL, on behalf of
this Chapter 11 Estate, and
UECKER & ASSOCIATES, INC.,
Liquidating Trustee,
Plaintiffs,

v.

RUTH P. GLOBERSON, FELIX O. KOLB,
THEODORE A. KOLB, JONATHAN KOLB,
RICHARD KOLB, and DOUGLAS KOLB,
Defendants.

Case No. 97-32321
Chapter 11

Adv. No. 99-3144

AMENDED MEMORANDUM DECISION ON MOTIONS
FOR PARTIAL SUMMARY JUDGMENT AND
TO DISMISS, AND DECISION ON MOTIONS FOR
RECONSIDERATION AND TO AMEND SUPPLEMENTAL COMPLAINT

1 I. Introduction¹

2 On April 26, 2006, the court issued its Memorandum Decision
3 Regarding Judicial Estoppel that describes the background of this
4 lengthy dispute in more detail (the "Judicial Estoppel Decision").
5 Terms not defined herein have the meanings given in that decision.

6 The rightful ownership of Ted's share of his father's trust
7 was disputed. Notwithstanding that dispute, Ted and his siblings,
8 acting as Successor Trustees of the trust, distributed Ted's share
9 (the "Property") to his sons and not to Cassel as representative
10 of Ted's creditors, who turned out to be the rightful owners.

11 This is an action to recover the Property or its value. The
12 Successor Trustees and Ted's sons (collectively, "Defendants")
13 previously argued that they were protected from liability because
14 the California probate court approved the distributions and
15 discharged the Successor Trustees. The Judicial Estoppel Decision
16 holds that they are estopped from raising the probate court orders
17 as a defense in this action.

18 Defendants now argue that the distributions were properly
19 made in reliance on this court's earlier judgment that Ted's
20 disclaimer of any interest in the Property was valid (the
21 "Disclaimer Judgment") even though the true ownership of the
22 Property was still disputed and had yet to be finally resolved by
23

24 ¹ The following discussion constitutes the court's findings
25 of fact and conclusions of law. Fed. R. Bankr. P. 7052
26 (incorporating by reference Fed. R. Civ. P. 52(a)). Unless
27 otherwise indicated, all chapter, section and rule references are
28 to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal
Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and
promulgated prior to the effective date of The Bankruptcy Abuse
Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119
Stat. 23.

1 the Ninth Circuit. The court rejects this and other arguments
2 raised by Defendants and holds that the Successor Trustees are
3 jointly and severally liable for the amount of all distributions
4 to Ted's sons, plus interest, and Ted's sons are liable for what
5 they received individually, plus interest. The court makes no
6 determination on Cassel's claim for punitive damages or his
7 asserted rights to consequential damages and attorneys' fees, and
8 declines to enter any judgment on fewer than all claims pursuant
9 to Fed. R. Civ. P. 54(b) (incorporated by Fed. R. Bankr. P.
10 7054(a)), for the reasons stated on the record at the hearing on
11 December 14, 2006.

12
13 II. Procedural background

14 After the Judicial Estoppel Decision the court issued orders
15 that among other things permitted Cassel to add the Successor
16 Trustees as named defendants and to file a supplemental complaint
17 regarding the distributions made by the Successor Trustees to
18 Ted's sons. Cassel's supplemental complaint states (in ¶ 25):

19 This Supplemental Complaint concerns facts
20 occurring after the [original] Complaint in this
21 adversary proceeding was filed on April 19, 1999.
22 A copy of the Complaint is attached hereto and
23 incorporated herein as if set forth in full. The
24 numbering of paragraphs and the claims for relief
25 herein follows sequentially the numbered paragraphs
26 and the claims for relief in the Complaint.

27 In July of 2006 Defendants filed a motion to dismiss the
28 Supplemental Complaint (the "MTD").² In October of 2006, Cassel

26
27 ² The MTD treats the Supplemental Complaint as subsuming the
28 original Complaint. The court will treat the MTD as seeking
dismissal of both the original Complaint and the Supplemental
Complaint.

1 filed his Motion for Summary Judgment on less than All Claims for
2 Relief under Rule 54(b) (the "Partial MSJ"). The parties filed
3 opposition and reply papers and the motions came on for hearing on
4 December 14, 2006.

5 On January 26, 2007, the court issued a Memorandum Decision
6 on the MTD and the Partial MSJ. The parties filed cross-motions
7 for reconsideration and plaintiffs filed a motion for leave to
8 amend the Supplemental Complaint. Those matters came on for
9 hearing on April 20, 2007. Appearances at the hearings are noted
10 in the record. This Amended Memorandum Decision and orders issued
11 concurrently dispose of those motions.

12 13 III. Discussion

14 A. Defendants have not established that the Disclaimer 15 Judgment protects them from liability

16 Ted's sons cannot use the Disclaimer Judgment as a shield
17 from liability. It is well established that a party who
18 previously obtained funds based on a court order or judgment must
19 make restitution after reversal on appeal, even though the party
20 was entitled to the funds at the time. See generally Arkadelphia
21 Milling Co. v. St. Louis SW Ry. Co., 249 U.S. 134, 145 (1919);
22 5 Cal.Jur.3d, App. Review §§ 715, 720; Levy v. Drew, 4 Cal.2d 456,
23 50 P.2d 435 (1935) (under California law the restitution
24 obligation is in the nature of a trust obligation and is without
25 any right of setoff). Ted's sons have cited no authority to the
26 contrary.

27 The Successor Trustees also have not established that they
28 can use the Disclaimer Judgment as a shield. They had an

1 obligation to determine who should receive the funds that they
2 held. Under the Judicial Estoppel Decision they cannot rely on
3 the state court's orders approving their distributions and
4 discharging them. They must be treated as if they made
5 distributions favoring Ted's sons over Ted's creditors
6 (represented by Cassel) without the protection of those orders.

7 The Successor Trustees claim that under state law, even
8 without authorization from the probate court, they had no duty to
9 withhold distributions pending determination of Cassel's appeal.

10 They rely principally on Arluk Med. Ctr. Indus. Group, Inc. v.
11 Dobler, 116 Cal.App.4th 1324, 11 Cal.Rptr.3d 194 (2 Dist. 2004).

12 Arluk is inapposite. It involved a competition between
13 creditors and beneficiaries, not a dispute among alleged
14 beneficiaries. The majority in Arluk held that in proper
15 circumstances a trustee can make a distribution to beneficiaries
16 without incurring personal liability to unpaid creditors, some of
17 whom may be unknown, because under the Probate Code the trustee's
18 sole duty is to beneficiaries. Arluk, 116 Cal.App.4th 1324, 11
19 Cal.Rptr.3d 194. That holding has nothing to do with a trustee's
20 personal liability for making distributions to persons who turned
21 out not to be beneficiaries at all (Ted's sons), leaving the true
22 beneficiaries (Ted's creditors through Cassel) with nothing.

23 The Successor Trustees claim that if Ted's sons had demanded
24 distributions on the strength of the Disclaimer Judgment then they
25 would have had to comply with such demands, but that is not what
26 happened and they have not established that this is the law. The
27 Disclaimer Judgment might have been strong evidence that Ted's
28 sons were the proper parties to receive distributions, but that

1 judgment was subject to reversal on appeal as the Successor
2 Trustees knew. This court had no jurisdiction to authorize the
3 Successor Trustees to make distributions out of Leon's trust
4 estate, and was never asked to do so. The probate court was never
5 told that there was still a live controversy let alone asked to
6 rule on it when the distributions were made. Instead it was told
7 unequivocally that Ted's sons were entitled to the distributions.
8 The Judicial Estoppel Decision prevents the Successor Trustees
9 from using as a shield the state court orders authorizing
10 distributions and discharging them. Cassel has established
11 various theories under which a person who distributes contested
12 funds to the wrong party is liable, as discussed below.

13 The Successor Trustees claim, relying on Glass v. Najafi, 78
14 Cal.App.4th 45, 92 Cal.Rptr.2d 606 (2000), that they are protected
15 because they acted consistent with the Disclaimer Judgment before
16 it was reversed. That reliance is misplaced. Glass held that a
17 landlord was entitled to act upon a writ of possession and to use
18 self-help to evict a tenant before the writ was quashed. Id., 78
19 Cal.App.4th at 50-51. It says nothing about whether the landlord
20 had to return possession after the writ was quashed. See id. at
21 48 (issue of possession bifurcated from other issues). Cf.
22 Schubert v. Bates, 30 Cal.2d 785, 185 P.2d 793 (1947) (tenant
23 dispossessed in unlawful detainer action was entitled to be
24 restored to possession after judgment was reversed). Glass has no
25 bearing on whether the Successor Trustees have to return the
26 distributions, or the value of the distributions, that they made
27 to the wrong parties. The Successor Trustees have not met their
28 burden to establish a defense to Cassel's claims based on the

1 Disclaimer Judgment.

2 B. Defendants' liability under Section 542(a) (second and
3 third claims)

4 Defendants argue that any claim under Section 542(a) is
5 barred because it was not expressly reserved in Ted's confirmed
6 Plan. The court disagrees.

7 The principal economic aspect of the Plan is continuing
8 Cassel's pre-confirmation action, and that action is based in
9 large part on Section 542. The original Complaint, filed before
10 confirmation, is entitled "Creditor's Complaint to Avoid
11 Fraudulent Transfer, To Recover Property of the Estate and For
12 Other Related Relief." (Emphasis added.) It cites Section 542 at
13 the top of the second page and it argues (second claim for relief)
14 that Ted's disclaimer was invalid. The claim under Section 542(a)
15 survived confirmation and Cassel has standing to assert it.³

16 Section 542(a) provides:

17 542. Turnover of property to the estate

18 (a) Except as provided in subsection (c) or (d) of
19 this section [regarding entities without notice or
20 knowledge of the bankruptcy case, or insurance
21 companies], an entity, other than a custodian, in
22 possession, custody, or control, during the case,
of property that the trustee may use, sell, or
lease under section 363 of this title, or that the
debtor may exempt under section 522 of this title,
shall deliver to the trustee, and account for, such

23 ³ Defendants also argue (in their opposition to the Partial
24 MSJ, p. 4:25-26) that by implication Section 542 cannot be used
25 "when property has been transferred in derogation of one of the
26 avoiding powers" and that the Plan did not preserve any avoiding
27 powers (e.g., a claim under Section 549). The court disagrees
28 with the premise that the Plan needed to preserve any power to
avoid the distributions to Ted's sons, which had not yet occurred
when the Plan was confirmed. In any event, Section 542(a)
provides an independent basis for recovery of the Property, wholly
apart from any avoiding powers.

1 property or the value of such property, unless such
2 property is of inconsequential value or benefit to
the estate.

3 11 U.S.C. § 542(a).

4 Defendants had "possession, custody, or control, during the
5 case," of the Property. They knew that according to Cassel this
6 was property of the estate (or, in the language of the statute,
7 that Ted's beneficial interest in assets in his father's trust was
8 "property that the trustee may use, sell, or lease under section
9 363"). They knew that the rightful owner of the Property had yet
10 to be finally determined on appeal. Yet they ignored Cassel's
11 claims. The Successor Trustees distributed the Property and Ted's
12 sons received it. Defendants must deliver and account for "the
13 value of such property."

14 Under Section 542(a) it does not matter if Defendants
15 genuinely believed that Ted's sons were entitled to the Property.
16 The statute does not require "actual knowledge" of the true
17 ownership of property but only "notice of circumstances that would
18 cause a reasonable person to inquire further" as to the true
19 ownership of the property at issue. Matter of USA Diversified
20 Prod's, Inc., 100 F.3d 53, 57 (7th Cir. 1996). Defendants had
21 notice of such circumstances: Cassel's adversary proceeding and
22 his appeal from the Disclaimer Judgment. As the bankruptcy court
23 in Diversified observed, any distribution notwithstanding such
24 notice is at the distributor's "own peril." In re USA Diversified
25 Prod's, Inc., 193 B.R. 868, 879 (Bankr. N.D. Ind. 1995) (citation
26 omitted).

27 Nor does it matter that the Successor Trustees, and perhaps
28 Ted's sons as well, no longer have possession, custody, or control

1 of the Property. Section 542(a) speaks of delivering "the value
2 of such property" so it applies "not just to property presently in
3 someone's possession, custody or control but to property in its
4 'possession, custody or control during the case.'" Diversified,
5 193 B.R. at 875 (emphasis in original). Defendants may have
6 divested themselves of the Property but they certainly had
7 possession, custody, or control during the case. They must now
8 return the value of such Property.⁴

9 The Successor Trustees are jointly and severally liable for
10 the entire amount of what they distributed to Ted's sons, even if
11 they did not receive or benefit from such distributions
12 themselves. In Diversified a law firm received \$125,000 from a
13 Mr. Davis to fund a possible settlement involving him and the
14 company he owned, and after the company filed a Chapter 11
15 petition the law firm retained \$14,000 for its services and
16 returned the balance to Mr. Davis, who claimed that the \$125,000

17 ⁴ Defendants argue that Section 542(a) is inapplicable
18 because (a) the statute allegedly only applies "during the case"
19 and (b) the case allegedly ends upon the effective date of the
20 plan of reorganization, citing In re Greater Jacksonville Transp.
Co., 169 B.R. 221 (Bankr. M.D. Fla. 1994). Defendants are wrong
on both counts.

21 What must occur "during the case" is the possession, custody,
22 or control of property (Diversified, 193 B.R. at 875) not the
23 resolution of the Section 542(a) claim. Nor does the case end
24 upon confirmation. Ted's Chapter 11 case was open when the
25 distributions to Ted's sons were made and it is still open today.
26 Greater Jacksonville held that the period for filing a UCC
27 continuation statement was extended until 60 days after the
28 effective date of the plan of reorganization, which was the
"termination" of insolvency proceedings for purposes of former UCC
§ 9-403(2) as enacted in Florida. Id. at 223. That decision has
nothing to do with whether a person must return property, or its
value, that was in the person's possession, custody, or control
"during a case" under Section 542(a). Greater Jacksonville
specifically distinguishes "termination" of insolvency proceedings
under UCC § 9-403(2) from closing a case under Fed. R. Bankr. P.
3022. Id. at 224.

1 had come from his personal funds. That turned out to be wrong and
2 the law firm was held liable for the entire \$125,000, not just the
3 \$14,000 it had retained. Diversified, 100 F.3d at 56.

4 Ted's sons are liable for what they received. They had
5 possession, custody, or control, during the case, of a portion of
6 the Property and they must return what they received or its value.

7 The court will grant Cassel's Partial MSJ on his second claim
8 for relief (in the original Complaint) as against the Successor
9 Trustees as successors to named defendant Hilde and as against
10 Ted's sons as named defendants. The court will also grant
11 Cassel's Partial MSJ on the third claim for relief (in the
12 Supplemental Complaint) as against the Successor Trustees and
13 Ted's sons.

14 C. Sections 549 and 550 (fourth claim)

15 Cassel argues that the Successor Trustees became transferees
16 of an avoidable postpetition transfer under Section 549 when they
17 "assumed Hilde's role and took possession of property of the
18 probate estate, including the portion which should have been paid
19 to Ted's bankruptcy estate, and transferred it to Ted's sons."
20 Opp. to MTD at 5:14-16. Cassel asserts that Ted's sons are
21 immediate or mediate transferees from the Successor Trustees
22 within the meaning of Section 550(a)(2). The court does not
23 decide who is a transferee and whether Sections 549 and 550 are
24 applicable. Assuming without deciding that Cassel states a claim
25 under those sections, his fourth claim for relief is barred by the
26 two year statute of limitations in Section 549(d). See 11 U.S.C.
27 § 549(d) ("An action or proceeding under this section may not be
28 commenced after the earlier of -- (1) two years after the date of

1 the transfer sought to be avoided; or (2) the time the case is
2 closed or dismissed.”).

3 The Defendants did not raise the statute of limitations until
4 oral argument. The court’s initial view at the hearing on
5 December 14, 2006, was that Defendants had waived this defense by
6 not raising in it their opposition to Cassel’s MSJ as required by
7 Fed. R. Civ. P. 56(c) and (e) (incorporated by Fed. R. Bankr. P.
8 7056). See In re Pugh, 158 F.3d 530, 532-38 (11th Cir. 1998)
9 (Section 549(d) is a true statute of limitation that can be
10 waived). On further consideration the court is persuaded that the
11 defense of a time bar has not been waived.

12 Courts are not inclined to find a technical failure to raise
13 an affirmative defense when the plaintiff had adequate notice of
14 the defense and was not deprived of the opportunity to respond.
15 See, e.g., Camarillo v. McCarthy, 998 F.2d 638, 639 (9th Cir.
16 1993). After the hearing Defendants filed and served a letter
17 brief (docket no. 239) arguing the limitations issues and inviting
18 Cassel to respond should he wish to do so. Cassel has filed no
19 response and has not established any prejudice from Defendants’
20 lateness in raising their defense under Section 549(d). Cassel
21 concedes in his opposition to the MTD (pp. 7:25-8:2) that the
22 Defendants’ conduct was revealed on June 23, 2003, and that the
23 first supplemental complaint was not filed until almost three
24 years later, on June 19, 2006. Therefore Cassel’s fourth claim
25 for relief is barred by the two year statute of limitations in
26 Section 549(d).

1 D. Successor Trustees' liability for breach of trust (fifth
2 claim)

3 Defendants argue that between the time of the Disclaimer
4 Judgment and the Ninth Circuit's reversal the estate was not a
5 beneficiary so they had no fiduciary duty to the estate. That is
6 incorrect. The estate was always a beneficiary (according to the
7 Ninth Circuit's binding determination). There were intermediate
8 rulings saying otherwise, but they were reversed. Defendants may
9 have tried to moot the Ninth Circuit decision by obtaining the
10 state court orders, but they are judicially estopped from using
11 those orders as a shield. As Cassel argues, there is no issue of
12 mootness both for this reason and because this court can fashion
13 effective relief in the form of restitution or damages.

14 Cassel has established a prima facie claim against the
15 Successor Trustees for breach of trust and the Successor Trustees
16 have not established any defense. The court will grant the Cassel
17 Partial MSJ against the Successor Trustees as to the fifth claim
18 for relief.⁵

19 E. Defendants' liability for conversion (sixth claim)

20 "Conversion is any act of dominion wrongfully exerted over
21 another's personal property in denial of or inconsistent with his
22 rights therein." Susumu Igauye v. Howard, 114 Cal.App.2d 122,
23 126; 249 P.2d 558, 561 (1952). See also Cal. Civil Code §§ 1712,
24 1713. Defendants argue that a plaintiff must establish an
25 immediate right to possession as an element of conversion, citing

26 ⁵ The court previously issued orders that erroneously denied
27 the MTD and granted the Partial MSJ as to Ted's sons on the fifth
28 claim for relief. All parties agree that Ted's sons were not
named in that claim, and the amended orders correct this error.

1 Greka Integrated, Inc. v. Lowrey, 133 Cal.App.4th 1572, 1581; 35
2 Cal.Rptr.3d 684, 691 (2005). Defendants read too much into Greka.

3 Greka states that the elements of conversion include "the
4 plaintiff's ownership or right to possession of the property at
5 the time of the conversion." Greka, 133 Cal.App.4th at 1581
6 (citation omitted, emphasis added). See also, Aero Prop's, Inc.
7 v. Gottlieb, 206 Cal.App.2d 711, 716; 24 Cal.Rptr. 277, 280 (1962)
8 (it was not conversion to hold collateral until debt was repaid).
9 As Cassel argues, the bankruptcy estate did have rights in the
10 Property "at the time of conversion" when the distributions were
11 made. The bankruptcy court and District Court did not think so,
12 but the Ninth Circuit reversed and held that Ted's disclaimer was
13 never effective so the Property had always been property of the
14 estate.

15 Nothing in Greka suggests the opposite. An employee was
16 accused of converting Greka's corporate documents but he stated in
17 his declaration that "he took the documents home at the direction
18 of Greka's chief executive officer" and Greka "presented no
19 evidence to the contrary" so it failed to make "a prima facie
20 showing that [the employee's] possession of the documents is
21 'wrongful.'" Greka, 133 Cal.App.4th 1572, 1581 (citation
22 omitted). There is no similarity between Greka and this case.
23 Cassel never consented to the Successor Trustees' transfer of the
24 Property to Ted's sons.

25 Defendants argue that dominion over the Property was lawful
26 at the time so no conversion was committed, citing Kertz v. Paris,
27 168 Cal.App.2d 67, 335 P.2d 154 (1959). That case involved some
28 laundry equipment that had been left on the premises by evicted

1 lessees and that was used by subsequent lessees and eventually
2 sold by them. The evicted lessees sued the landlord, who was held
3 not liable for conversion. The court stated:

4 In a very similar case, it has been held that
5 a lessor who secures possession of the leased
6 premises upon default by the lessee in payment of
7 rent, and transfers possession of the premises to
8 one who takes and holds with notice and knowledge
9 of lessee's rights in the furnishings, is not
10 liable to the lessee for a tortious conversion of
11 the furnishings by the lessee, in the absence of a
12 showing that the lessor participated in the
13 conversion.

14 Kertz, 168 Cal.App.2d at 70 (citation omitted, emphasis added).

15 In this case the Successor Trustees did participate with
16 Ted's sons in the conversion. They exercised dominion over the
17 Property that was inconsistent with the rights asserted by Cassel.

18 Defendants also cite Pullin v. Allen, 37 Cal.App. 218, 173 P.
19 772 (1918). That case involved a fee dispute in which the
20 attorneys withheld \$500 to which they claimed they were entitled.
21 Pullin actually supports Cassel. It implies that if the proper
22 amount of fees had been any less than \$500 then the attorneys
23 would have to turn over the difference or else be liable for
24 conversion:

25 Conceding, as we think must be admitted, that under
26 the facts of the case the defendants had the right
27 to retain possession of the five hundred dollars
28 until it was legally ascertained that a reasonable
compensation for their services amounted to a less
sum, then it must follow that until such
ascertainment was had there would be no ground for
the action of conversion.

29 Pullin, 37 Cal.App. at 220 (emphasis added).

30 Unlike the law firm in Pullin, the Successor Trustees did not
31 simply retain possession of the Property until it was legally
32 ascertained who was entitled to it. Instead they transferred the

1 Property to Ted's sons. That is conversion.

2 Defendants argue that the three year statute of limitations
3 for conversion has passed. See Cal. Code Civ. Pro. § 338(c).
4 Defendants claim that Cassel had actual notice of the probate
5 proceedings, should have filed a request for special notice, and
6 had constructive notice of the distributions. See Bono v. Clark,
7 103 Cal.App.4th 1409, 1433; 128 Cal.Rptr.2d 31, 49 (2002) ("if the
8 possessor acts in a manner inconsistent with the owner's
9 interests, the owner's cause of action for conversion accrues at
10 that time"). Cassel argues that the statute should be tolled
11 because the distributions were concealed and he did not discover
12 them until June 23, 2003.

13 The court is persuaded that the statute should be tolled.
14 In Bennett v. Hibernia Bank, 47 Cal.2d 540, 549; 305 P.2d 20, 26
15 (1957), the Hibernia Bank was reorganized from a "membership
16 corporation" to a "stock corporation . . . with stock in the
17 amount of \$7,000,000 divided among" 15 members. The complaint
18 alleged that this was done without the consent or ratification of
19 a 16th member, whose heirs received only \$363.54. On a general
20 demurrer the California Supreme Court rejected the statute of
21 limitations defense. The bank owed a fiduciary duty to make full
22 disclosure to the 16th member and not doing so was "akin to a
23 fraudulent concealment" that tolled the running of the statute:

24 Ordinarily the statute of limitations applying in
25 conversion actions, Code Civ. Proc., § 388, subd.
26 3, [begins] to run from the date of the conversion
27 even though the injured person is ignorant of his
28 rights. This rule, however, is not absolute; for
example, where there has been a fraudulent
concealment of the facts the statute of limitations
does not commence to run until the aggrieved party
discovers or ought to have discovered the existence

1 of the cause of action for conversion.

2 Since a fiduciary has a duty to make a full
3 disclosure of facts which materially affect the
4 rights of the parties, it seems obvious that any
act by him amounting to a conversion of trust
property is akin to a fraudulent concealment.

5 Bennett v. Hibernia Bank, 47 Cal.2d 540, 560-61; 305 P.2d 20
6 (1957) (citations omitted).

7 The Successor Trustees had a fiduciary duty to make full
8 disclosure to Cassel, who stood in Ted's shoes as a beneficiary of
9 his father's trust. Cassel did not need to file any request for
10 special notice because he was entitled to rely on the Successor
11 Trustees' duty to make full disclosure. The absence of that
12 disclosure is "akin to a fraudulent concealment" and it tolled the
13 running of the statute of limitations from the time of conversion
14 until the conversion was discovered on June 23, 2003. Id. The
15 Supplemental Complaint was filed less than three years later, on
16 June 19, 2006, and is therefore timely.

17 The fact that the probate proceedings were of public record
18 did not give Cassel constructive notice. Bennett held that "while
19 public records [are] constructive notice for certain purposes,
20 [they] are not sufficient to start the running of the statute in
21 favor of the fiduciary as to those of its members who had no
22 knowledge of them." Id., 47 Cal.2d at 562.

23 Therefore the statute of limitations does not bar Cassel's
24 conversion claim against the Successor Trustees. The next
25 question is whether it bars his conversion claim against Ted's
26 sons.

27 Ted's sons argue that the court should reconsider its holding
28 that Bennett is applicable to them because they are not

1 fiduciaries. That misses the point. The court's reasoning does
2 not depend on whether they are fiduciaries.⁶

3 In Bennett the defendants included the 15 individuals who
4 received the stock from Hibernia. The California Supreme Court
5 rejected their statute of limitations defense even though they may
6 not have been fiduciaries:

7 It does not follow from the fact that there

8
9 ⁶ Cassel argues that Ted's sons are in fact fiduciaries.
10 Cassel's theory is apparently that after the Ninth Circuit's
11 decision became final (a) Ted's sons had not just a restitutionary
12 obligation to return the distributions but a fiduciary duty to do
13 so, and (b) their failure to do so, or to reveal their conduct to
14 Cassel, tolled the running of the three year statute of
15 limitations for conversion.

16 Ted's sons argue that any restitutionary obligation is
17 analogous to a constructive trust and therefore creates no
18 fiduciary relationship. See PCO, Inc. v. Christensen et al., LLP,
19 07 C.D.O.S. 4776, 4780 (2007); Haskel Engineering & Supply Co. v.
20 Hartford Acc. & Indem. Co., 78 Cal.App.3d 371, 144 Cal.Rptr. 189
21 (1978). Cassel cites cases that describe the restitutionary
22 obligation using language reminiscent of express or resulting
23 trusts, or that impose trust duties even on constructive trustees.
24 See Levy, 4 Cal.2d at 462, 50 P.2d at 437; Ward v. Sherman, 155
25 Cal. 287, 291; 100 P. 864, 865-66 (1909); Redke v. Silvertrust, 6
26 Cal.3d 94, 106-07; 98 Cal.Rptr. 293, 300-01 (1940).

27 The court need not decide these issues. Assuming for the
28 sake of argument that Cassel's fiduciary theory is correct, any
tolling based on that theory (as opposed to Bennett, discussed in
the text) is too little too late.

Cassel did not file his Supplemental Complaint until June 19,
2006, which is more than four years after Ted's sons received the
distributions. See Supplemental Complaint (docket no. 166, ¶ 33)
(alleging distributions as late as February 15, 2002). Under
Cassel's fiduciary theory tolling does not begin until there was a
restitutionary obligation, which was approximately late April of
2003 when the Ninth Circuit's decision became final. See Fed. R.
Bankr. P. 8002. Any tolling would end when Cassel discovered the
conversion on June 23, 2003. This is only a couple of months out
of a period of more than four years, which is inadequate to stop
the three year limitations period from expiring.

Cassel argues in the alternative that Ted's sons should be
estopped to plead the statute of limitations. See Pashley v.
26 Pacific Elec. Co., 25 Cal.2d 226, 231-36; 153 P.2d 325, 328-30
(1944). The court is not persuaded. Among other things Cassel
27 could have been more diligent in monitoring the probate
28 proceedings and filing the Supplemental Complaint after the
conversion was discovered.

1 may have been no fiduciary relationship between
2 [the heirs of the 16th member of the bank] and the
3 15 individual defendants that the statute has run
4 in their favor. The complaint alleges that the
5 individual defendants received their shares of
6 stock in 1947 with full knowledge of, and subject
7 to, the rights of [the 16th member] and his
8 successors as members. Accordingly, we must assume
9 that these defendants had notice of any breach of
10 fiduciary duty or trust upon the part of the
11 corporation. In analogous situations it has been
12 held that, if a trustee of an express trust
13 improperly transfers trust property to a third
14 person who has knowledge that the transfer is in
15 breach of trust, the statute of limitations does
16 not run on the beneficiary's action against the
17 third person until such time as the beneficiary
18 learns of the breach of trust or of facts
19 sufficient to arouse his suspicion.

11 Bennett, 47 Cal.2d at 34, 305 P.2d at 34 (emphasis added,
12 citations omitted).

13 Ted's sons had notice that the Successor Trustees were
14 distributing property to them that, according to Cassel, belonged
15 to Ted's creditors. As stated in the Judicial Estoppel Decision
16 (p. 4:8-11), Cassel had served a notice of this claim on the state
17 court attorneys for Ted's sons and those attorneys knew of
18 Cassel's claims anyway because they "had been arguing for years in
19 federal court over whether Ted's disclaimer was effective"
20 Ted's sons nevertheless participated with the Successor Trustees
21 in misrepresenting to the state court that there was no dispute
22 that they were entitled to the Property. Therefore under Bennett
23 tolling applies to Ted's sons despite the fact that there may have
24 been no fiduciary relationship between them and Ted's creditors.

25 For all of these reasons Cassel has established his claim for
26 conversion and Defendants have not established that the claim is
27 time barred. The court will grant Cassel's Partial MSJ on the
28

1 sixth claim for relief.⁷

2 F. Fraudulent transfer (first and seventh claims)

3 The court rejects these claims for the reasons stated at the
4 hearing on December 14, 2006.

5 G. Asserted defense of setoff for taxes

6 The Partial MSJ asserts that each of Ted's three sons
7 received \$224,251.76, for a total distribution of \$672,755.28.
8 Defendants do not contest the amounts but argue that the net
9 distributions were only \$180,955.30 to each of Ted's sons after
10 payment of \$129,889.37 in taxes. Defendants argue that they are
11 entitled to a setoff for this tax payment, because allegedly if
12 they had not paid these taxes then someone else would have had to
13 -- Leon's trust estate, Ted's bankruptcy estate (or its successor
14 the Liquidating Trust), or Ted's creditors. According to
15 Defendants, the taxes were passed through to and paid by "the
16 Trust beneficiaries because one beneficiary, not involved in this
17 proceeding [i.e., one of Ted's siblings], could make use of a net
18 loss carry forward." Opp. to Partial MSJ p. 12:22-24. This pass-
19 through allegedly saved the probate estate from paying the taxes,
20 which ultimately benefits Ted's creditors, according to
21 Defendants.

22 Cassel argues that just as one of Ted's siblings had a net
23

24 ⁷ Ted's sons argue in their motion for reconsideration that
25 as a matter of law there could be no punitive damages assessed
26 against them because, if Cassel's sixth claim is time barred,
27 there is no surviving tort claim to support punitive damages.
28 That argument now falls because the court has rejected their time
bar argument. Cassel may also be able to establish a tort of
aiding and abetting a breach of fiduciary duty by the Successor
Trustees as discussed below. That said, the burden is still on
Cassel to establish how punitive damages would be warranted.

1 loss carry forward, so too some of Ted's creditors might not have
2 tax liability, or at least Defendants have not established that by
3 paying their own taxes they have reduced the taxes that Ted's
4 creditors would have to pay on a dollar for dollar basis. Cassel
5 argues that Defendants' remedy is to file amended tax returns and
6 seek a refund.

7 The court rejects the setoff defense for a different reason.
8 Under California law the restitution obligation is without any
9 right of setoff. See Levy v. Drew, 4 Cal.2d at 461-63. The court
10 expresses no opinion whether Ted's sons (or whoever paid their tax
11 obligations) would be entitled to a refund or could establish a
12 claim against the bankruptcy estate or the Liquidating Trust for
13 any alleged benefit from paying the taxes on the distributions to
14 Ted's sons. Levy instructs that such claims must be kept separate
15 and cannot be used as a setoff. See Levy v. Drew, 4 Cal.2d at
16 461-63 (after reversal, restitution is a trust obligation and
17 creditor was obligated to return funds to insolvent debtor without
18 right of setoff). See also Annotation, Judgment Debtor's Right to
19 Restitution upon Reversal or Vacation of Judgment as Subject to
20 Set-off in Favor of Judgment Creditor, 101 A.L.R. 1148 ("Though
21 the grounds of the decisions have been somewhat variant, the
22 ultimate question whether the right of a judgment debtor for
23 restitution upon reversal or vacation of the judgment is subject
24 to a set-off in favor of the judgment creditor has been uniformly
25 answered in the negative by all the courts which have had occasion
26 to pass upon that question.").

1 H. Asserted defense of litigation privilege

2 Defendants argue that the distributions to Ted's sons are
3 protected by the litigation privilege. "A privileged publication
4 or broadcast is one made . . . (b) In any . . . (2) judicial
5 proceeding," Cal. Civ. Code § 47(b)(2).

6 Defendants are correct that the litigation privilege has been
7 held to extend beyond the communication itself. The California
8 Supreme Court has stated:

9 we conclude that if the gravamen of the action is
10 communicative, the litigation privilege extends to
11 noncommunicative acts that are necessarily related
12 to the communicative conduct, which in this case
included acts necessary to enforce the judgment and
carry out the directive of the writ.

13 Rusheen v. Cohen, 37 Cal.4th 1048, 1065; 128 P.3d 713, 724; 39
14 Cal.Rptr.3d 516, 529 (2006) (party's acts to enforce judgment,
15 which had allegedly been obtained using perjured proof of service,
16 were protected by litigation privilege).

17 The court explained:

18 modern public policy seeks to encourage free access
19 to the courts and finality of judgments by limiting
20 derivative tort claims arising out of
litigation-related misconduct and by favoring
sanctions within the original lawsuit.

21 37 Cal.4th 1048, 1063; 128 P.3d 713, 723; 39 Cal.Rptr.3d 516, 527.

22 The court assumes for the sake of argument that the gravamen
23 of any relevant claim is communicative. In that event the
24 litigation privilege might apply both to Defendants'
25 communications (e.g., their false and misleading assertions to the
26 probate court that all beneficiaries agreed to the distributions)
27 and also to the benefits that they derived from making those
28 assertions -- i.e., the probate court orders approving the

1 distributions and discharging the Successor Trustees. Cassel's
2 remedy ordinarily would be to return to the probate court and seek
3 sanctions or other relief in that case. This is not an ordinary
4 situation. In this case there is a separate federal litigation,
5 and there is a separate interest in protecting the integrity of
6 that litigation in federal court. The Judicial Estoppel Decision
7 bars the Defendants from asserting that their actions are
8 protected by the proceedings state court. The litigation
9 privilege does not protect Defendants.

10 I. Pre-judgment interest

11 Both Cassel and the Defendants have cited authority that pre-
12 judgment interest is within the court's discretion, although in
13 his motion for reconsideration Cassel argues that in reality his
14 claims are based on state law and the court has no discretion.
15 The parties also dispute whether, if any interest is awarded, it
16 should be at the 10% rate applicable to California claims for
17 breach of fiduciary duty, the 7% rate applicable to non-fiduciary
18 California claims, or the federal post-judgment interest rate that
19 is often used as a guide to pre-judgment interest. In his motion
20 for reconsideration Cassel also argues that if the federal rate of
21 interest rate applies then it should be compounded, citing 28
22 U.S.C. § 1961(b), and multiple rates should apply based on when
23 each distribution was made to Ted's sons, rather than the 1.22%
24 rate applicable when the Ninth Circuit rendered its opinion.

25 The court is persuaded that it has discretion whether to
26 award pre-judgment interest, and at what rate, because Cassel's
27 claims have been preserved by federal judicial estoppel and
28 include claims under federal bankruptcy law. Defendants argue

1 persuasively that any interest rate should be uniform as between
2 the Successor Trustees and Ted's sons to avoid inconsistencies
3 between the Defendants' obligations to Cassel and the claims among
4 them for indemnity or contribution. See Banks v. Gill
5 Distribution Centers, Inc., 263 F.3d 862, 871-72 (9th Cir. 2001).
6 Applying its discretion the court will award interest and will
7 apply a rate of 1.22% per annum without any compounding.

8 J. Amendment to the Supplemental Complaint

9 Plaintiffs seek leave to add what they call a "Fifth Claim 2d
10 for Relief (Aiding and Abetting Breach of Trust)." The entire
11 proposed claim, apart from allegations incorporated by reference,
12 consists of the following:

13 Ted's children, for their own financial
14 advantage, actively participated with the Successor
15 Trustees in the breaches of trust alleged above, by
16 inducing, aiding and/or abetting one or more [of]
the breaches by receiving trust property from the
Successor Trustees in knowing breach of the trust.
[Emphasis added.]

17 Defendants argue that the court should not grant leave to
18 make this amendment because there has been substantial delay. The
19 court is not persuaded. Much of that delay is of their own doing.
20 They have also shown no prejudice. See generally Foman v. Davis,
21 371 U.S. 178 (1962); Fed. R. Bankr. P. 7015 (incorporating Fed. R.
22 Civ. P. 15).

23 Defendants argue in the alternative that it would be futile
24 to allow the amendment because "[a] non-fiduciary cannot conspire
25 to breach a duty owed only by a fiduciary." Kidron v. Movie
26 Acquisition Corp., 40 Cal.App.4th 1571, 1597; 47 Cal.Rptr.2d 752,
27 768 (2d Dist. 1995, reh. den. 1996) (citing Applied Equipment
28 Corp. v. Litton Saudi Arabia Ltd., 7 Cal.4th 503, 510-11; 28

1 Cal.Rptr.2d 475, 478 (1994)). Cassel argues that there is an
2 exception to this rule and that a non-fiduciary can be liable for
3 inducing, aiding, or abetting a breach of fiduciary duty if the
4 non-fiduciary actively participates in furtherance of his or her
5 own financial gain.

6 The court believes that both parties are confusing conspiracy
7 theories with aiding and abetting theories. Defendants are
8 correct that a non-fiduciary cannot conspire to breach a fiduciary
9 duty, but a non-fiduciary can aid and abet a breach of fiduciary
10 duty.⁸ The parties' disagreement concerns what is, in the court's
11 view, a largely irrelevant split among the California Courts of
12 Appeal that is properly limited to claims based on conspiracy.

13 It is well established that at common law a beneficiary may
14 recover from a transferee who receives trust property with notice
15 or knowledge of the trustee's breach of fiduciary duty. See City
16 of Atascadero v. Merrill Lynch et al., Inc., 68 Cal.App.4th 445,
17 461; 80 Cal.Rptr.2d 340 (1st Dist. 1998) ("under long-established
18 trust law, trust beneficiaries retain the right to bring claims
19 directly against third parties who have induced the trustee to
20 commit a breach of trust, aided or abetted such a breach by the
21 trustee, or received and retained trust property from the trustee
22

23 ⁸ The parties have not briefed whether California recognizes
24 a tort for "inducing" a breach of fiduciary duty, nor whether
25 "aiding" a breach is different from "abetting" a breach. The
26 court expresses no opinion on these issues, but assumes for the
27 sake of discussion Cassel's proposed amendment comprises a single
28 tort known as aiding and abetting a breach of fiduciary duty. But
cf. 1-800 Contacts, Inc. v. Steinberg, 107 Cal.App.4th 568, 581 &
n.10, 588 & n.15; 132 Cal.Rptr.2d 789, 799-800 & n.10, 805 & n.15
(2d Dist. 2003) (on plaintiff's concession, treating claim for
inducing breach of fiduciary duty as equivalent to claim for
conspiracy to breach fiduciary duty).

1 in breach of trust") (citations omitted); Restatement (Second) of
2 Trusts § 291 (1959) (transferee with notice or knowledge of breach
3 of trust can be compelled to restore property or pay its value as
4 of various times, depending on when notice or knowledge occurred);
5 A.W. Scott & W.F. Fratcher, 4 The Law of Trusts § 291 (4th Ed.
6 1989 & 2006 Supp.) ("Scott on Trusts") ("If a trustee in breach of
7 trust transfers trust property to a person who takes with notice
8 of the breach of trust, the transferee can be compelled to restore
9 the property to the trust, or to pay its value or its proceeds if
10 he has disposed of it."); 13 Witkin, Summary of Cal. Law § 149(3)
11 ("The beneficiary may sue persons (other than bona fide
12 purchasers) to whom the trustee has wrongfully transferred trust
13 property, to recover the property or its product.") (citations
14 omitted) and id. § 150 (same, specifically where third person
15 participates in breach of trust).

16 Recovery of wrongfully transferred property may be
17 appropriate even when the transferee acted in good faith. See
18 Restatement (Second) of Trusts § 291, Illustration 2 (transferee
19 who has not disposed of property can be compelled to restore it,
20 even though he thought trustee was empowered to sell "owing to a
21 misinterpretation of the terms of the trust") and Comment g
22 (transferee with notice of breach of trust who has disposed of
23 property is liable for its value, "even though he did not have
24 knowledge of the breach of trust or act in bad faith"); Scott on
25 Trusts § 291.2 (transferee who did not receive property with
26 actual knowledge of breach of trust should have no liability
27 beyond returning property, and any income received from it). See
28 also 76 Am. Jur.2d Trusts § 532 ("Where a trustee wrongfully sells

1 and transfers trust property, . . . the beneficiary may follow the
2 property or its proceeds, so far as it can be traced, into the
3 hands of the purchaser, assuming, of course, that the purchaser
4 does not have the status of a bona fide purchaser for value.").

5 The above authorities generally do not distinguish between
6 conspiracy and other possible grounds for recovery of trust
7 property from a transferee. See Neilson v. Union Bank of Cal.,
8 N.A., 290 F.Supp.2d 1101, 1126 n.74 (C.D. Cal. 2003) ("The
9 Restatement speaks of 'participation' in a breach of trust, rather
10 than 'conspiracy' or 'aiding and abetting.'"). Defendants treat
11 Cassel's claim as one based on conspiracy. The court will address
12 conspiracy first and then turn to aiding and abetting.

13 Conspiracy-based claims have some advantages to a plaintiff.⁹
14 A conspiracy imposes vicarious liability and need not be limited
15 to transferees. Berg & Berg Enters., LLC v. Sherwood Partners,
16 Inc., 131 Cal.App.4th 802, 823 & n.10; 32 Cal.Rptr.3d 325, 339-40
17 & n.10 (6th Dist. 2005). Conspiracy-based claims also have some
18 disadvantages from a plaintiff's point of view. One disadvantage
19 is that if the alleged conspirator is an attorney, agent, or
20 employee of the fiduciary then he or she is generally protected by
21 the "'agent's immunity rule,' which establishes that 'an agent is
22 not liable for conspiring with the principal when the agent is
23 acting in an official capacity on behalf of the principal.'"
24 Berg, 131 Cal.App.4th at 817; 32 Cal.Rptr.3d at 335 (following

25
26 ⁹ As stated in Applied Equipment, 7 Cal.4th at 510-11, 869
27 P.2d at 478, "Conspiracy is not a cause of action, but a legal
28 doctrine that imposes liability on persons who, although not
actually committing a tort themselves, share with the immediate
tortfeasors a common plan or design in its perpetration."
(Citation omitted.)

1 Doctors' Co. v. Superior Court, 49 Cal.3d 39, 260 Cal.Rptr. 183
2 (1989)) (other citations omitted); Cal. Civ. Code § 1714.10
3 (codifying rule of Doctors' Co. as to attorneys). An exception to
4 the agent's immunity is when the agent actively participated in
5 the breach of the trustee's fiduciary duty in furtherance of his
6 or her own financial gain. Berg, 131 Cal.App.4th at 818 and 834,
7 32 Cal.Rptr.3d at 335 and 348. This exception, and the agent's
8 immunity rule as a whole, are irrelevant in the court's view
9 because Ted's sons are not alleged to be the Successor Trustees'
10 attorneys, agents, or employees. Nevertheless both the parties
11 and some reported decisions conflate the exception to the agent's
12 immunity rule with a second limitation on conspiracy-based claims.

13 The second limitation is that conspiracy is not an
14 independent tort. It "allows tort recovery only against a party
15 who already owes [a] duty and is not immune from liability based
16 on applicable substantive tort law principles." Applied
17 Equipment, 7 Cal.4th at 514, 28 Cal.Rptr.2d at 480 (emphasis
18 added). Some duties are nearly universal: "The law imposes the
19 obligation that every person is bound without contract to abstain
20 from injuring the person or property of another, or infringing
21 upon any of his rights." Younan v. Equifax Inc., 111 Cal.App.3d
22 498, 511; 169 Cal.Rptr. 478, 486 (2d Dist. 1980). Other duties
23 apply only to certain classes of persons, or are inapplicable to
24 certain classes of persons. In Applied Equipment the California
25 Supreme Court held that a contracting party could not conspire to
26 interfere with its own contract because it "owes no general tort
27 duty to another not to interfere with performance of the contract;
28 its duty is simply to perform the contract according to its

1 terms." Id. The court was concerned that allowing a tort claim
2 for conspiracy would transform simple a contract breach into a
3 tort, which would allow recovery of tort damages and otherwise
4 blur the line between contract and tort claims. Id., 7 Cal.4th at
5 514-18, 28 Cal.Rptr.2d at 480-83. The court did not doubt that
6 the same conduct might give rise to both contract and tort claims,
7 including conspiracy-based claims, but it rejected conspiracy as a
8 means of creating a tort claim where none would otherwise exist.
9 Id., 7 Cal.4th at 520 n.8, 28 Cal.Rptr.2d at 484 n.8.

10 Following this reasoning many of the California Courts of
11 Appeal have held (correctly in this court's view) that because a
12 non-fiduciary has no fiduciary duty he or she cannot be liable for
13 conspiring to breach such a duty. Berg, 131 Cal.App.4th 802; 32
14 Cal.Rptr.3d 325; 1-800 Contacts, 107 Cal.App.4th at 592; 132
15 Cal.Rptr.2d at 808; Everest Investors 8 v. Whitehall Real Estate
16 L.P. XI, 100 Cal.App.4th 1102, 1106; 123 Cal.Rptr.2d 297, 301 (2d
17 Dist. 2002); Kidron, 40 Cal.App.4th at 1597, 47 Cal.Rptr.2d at
18 768; Younan, 111 Cal.App.3d 498, 169 Cal.Rptr. 478 (non-fiduciary
19 can conspire to commit actual fraud, but not constructive fraud)
20 (discussed with approval in Applied Equipment, 7 Cal.4th at 512,
21 28 Cal.Rptr.2d at 479). See also 12 Cal.Jur.3d Civil Conspiracy
22 § 5 (citing authority that, just as a party to contract cannot be
23 liable for conspiracy to interfere with same, a non-employer third
24 party cannot be liable for conspiracy wrongfully to terminate
25 employment).

26 Other decisions agree with this as a general rule, but they
27 state or imply that Doctors' Co. establishes an exception -- an
28 affirmative basis for liability rather than a narrow exception to

1 the agents' immunity rule. Under this approach one who is legally
2 incapable of committing the underlying tort can nevertheless be
3 liable for conspiracy if he or she actively participated in the
4 fiduciary's breach of duty in furtherance of his or her own
5 financial gain. See Pierce v. Lyman, 1 Cal.App.4th 1093, 1104 &
6 n.7; 3 Cal.Rptr.2d 236, 242 & n.7 (2d Dist. 1991) (attorneys for
7 former trustees had no fiduciary relationship with beneficiary,
8 but could be liable for conspiring to violate fiduciary duty "if
9 the attorney was acting in furtherance of his or her own financial
10 gain"); In re County of Orange, 203 B.R. 983, 997-1000 & n.15
11 (Bankr. C.D. Cal. 1996) (same, for non-fiduciary provider of
12 financial rating services), rev'd in part on other grounds, 245
13 B.R. 138 (C.D. Cal. 1997); Atascadero, 68 Cal.App.4th at 464 n.14,
14 80 Cal.Rptr.2d at 342 n.14 (same, for non-fiduciary financial
15 broker and advisor); Wolf v. Mitchell, Silberberg & Knupp, 76
16 Cal.App.4th 1030, 1033, 1039-42; 90 Cal.Rptr.2d 792, 793, 797-99
17 (2d Dist. 1999) (same, for trustee's attorney).

18 This split has been recognized but not resolved by the more
19 recent cases. See Everest, 100 Cal.App.4th at 1108-09, 123
20 Cal.Rptr.2d at 302-03 (acknowledging "existence of language in
21 several Court of Appeal opinions that is not entirely reconcilable
22 with our analysis" and suggesting that "[p]erhaps it is time for
23 the [California] Supreme Court to revisit these issues."); 1-800
24 Contacts, 107 Cal.App.4th at 592, 132 Cal.Rptr.2d at 808
25 (following Everest but acknowledging "contrary understanding" by
26 certain decisions).

27 The court believes that a non-fiduciary cannot conspire to
28 breach a fiduciary and that "the exception for conduct undertaken

1 in pursuit of a personal interest or advantage applies only to the
2 agent's immunity rule." 1-800 Contacts, 107 Cal.App.4th at 592,
3 132 Cal.Rptr.2d at 808 (emphasis added). The alternative approach
4 would "effectively swallow up the rule" -- it would permit
5 conspiracy for essentially any claim, regardless whether the
6 alleged conspirator is legally capable of committing the
7 underlying tort -- "because personal interest or advantage is
8 generally the impetus or goal of conspiratorial conduct." Id.

9 Cassel attempts to distinguish Everest and 1-800 Contacts by
10 arguing that the non-fiduciaries in those cases were former agents
11 who had lost their immunity and were not actual recipients of the
12 fruits of the breach of trust. That is inaccurate. The non-
13 fiduciary in Everest was a purchaser, not an agent, who allegedly
14 conspired with fiduciaries of a limited partnership to purchase
15 its assets at significantly less than fair market value, thereby
16 receiving the fruits of the alleged breach of trust. Everest, 100
17 Cal.App.4th at 1104, 123 Cal.Rptr.2d at 299. In 1-800 Contacts
18 the non-fiduciary was an attorney who never had an attorney-client
19 or other agency relationship with the plaintiff and he too had
20 allegedly obtained the fruits of the breach of trust -- his
21 "personal gain" was "to undertake a profitable legislative
22 consulting business" based on the use of information allegedly
23 obtained through the plaintiff's former in-house counsel who had
24 shared that information in violation of his fiduciary duties.
25 1-800 Contacts, 107 Cal.App.4th at 591, 132 Cal.Rptr.2d at 807.
26 Cassel's attempts to distinguish these cases are unavailing.

27 For all of these reasons the court agrees with Defendants
28 that Ted's sons, who were not fiduciaries (at least at the time of

1 the alleged breach, see footnote 6 above), could not conspire to
2 breach any fiduciary duties owed by the Successor Trustees.
3 Kidron, 40 Cal.App.4th at 1597, 47 Cal.Rptr.2d at 768. That does
4 not mean that Cassel's claim for aiding and abetting a breach of
5 fiduciary duty is barred. In the court's view, both the letter
6 and the spirit of Applied Equipment are consistent with
7 recognizing aiding and abetting a breach of fiduciary duty as a
8 separate tort claim from conspiracy to breach a fiduciary duty.

9 The differences between conspiracy and aiding and abetting
10 are not merely semantic. A conspiracy exposes the conspirators to
11 vicarious liability for all acts committed pursuant to an
12 agreement to commit a tortious act or acts, "irrespective of
13 whether or not he was a direct actor and regardless of the degree
14 of his activity." Applied Equipment, 7 Cal.4th at 511, 28
15 Cal.Rptr.2d at 478 (citations omitted). See also Haning,
16 Flahavan, and Kelly, Cal. Pract. Guide Pers. Inj. Ch.2-E at
17 ¶¶ 2:347-2:369 (Rutter Group, 2007) ("CPG Pers. Inj."); Neilson,
18 290 F.Supp.2d at 1134-35. In contrast aiding and abetting
19 requires a substantial causal connection between the culpable
20 conduct of the aider and abettor himself or herself and the harm
21 to the plaintiff, and although it requires no advance agreement it
22 does require actual knowledge that the primary wrongdoer's conduct
23 constitutes a breach of duty. CPG Pers. Inj. at ¶ 2:369.6;
24 Neilson, 290 F.Supp.2d at 1134-35. These differences have led
25 several courts to recognize that a non-fiduciary can aid and abet
26 a breach of fiduciary duty. Neilson, 290 F.Supp.2d at 1118-29,
27 1132-37; Casey v. U.S. Bank National Ass'n, 127 Cal.App.4th 1138,
28 1145 n.2, 26 Cal.Rptr.3d 401, 406 n.2 (4th Dist. 2005) ("aiding

1 and abetting a tort differs fundamentally from liability based on
2 conspiracy to commit a tort" for the reasons "articulated so well
3 in the Neilson opinion"); Berg, 131 Cal.App.4th at 823, 835 &
4 n.10; 32 Cal.Rptr.3d at 339-40, 349 & n.10 (following Neilson);
5 Atascadero, 68 Cal.App.4th at 460-70 & n.14, 80 Cal.Rptr.2d at
6 340-46 & n.14 (non-fiduciary agent cannot conspire to breach duty
7 owed by fiduciary, but non-fiduciary can induce, aid, or abet
8 breach of fiduciary duty, disagreeing with Kidron to the extent it
9 "purports to establish an absolute rule barring any cause of
10 action against a nonfiduciary for aiding and abetting a breach of
11 fiduciary duty . . .") (emphasis added). But see County of
12 Orange, 203 B.R. at 999 ("I see no reason for treating the
13 vicarious tort of aiding and abetting breach of a fiduciary duty
14 differently from that of conspiracy to breach a fiduciary duty");
15 1-800 Contacts, 107 Cal.App.4th at 588 & n.15, 132 Cal.Rptr.2d at
16 805 & n.15 (plaintiff acknowledged that its claim for inducing
17 breach of fiduciary duty was properly equated to claim for
18 conspiracy to breach fiduciary duty).

19 The different elements of conspiracy to breach a fiduciary
20 duty and aiding and abetting such a breach persuade the court that
21 Cassel's proposed amendment is not futile. The dangers that
22 Applied Equipment sought to avoid are not present: if there are
23 any tort damages they will arise because all the substantive
24 elements of a tort have been satisfied -- the tort of aiding and
25 abetting a breach of fiduciary duty -- not because a contract
26 claim has been bootstrapped into a tort claim. As stated by
27 Neilson:

28 [T]he court concludes that the analysis set

1 forth in Applied Equipment does not mandate a
2 finding that California law implicitly requires
3 that a defendant owe plaintiffs a duty before she
4 can be held liable for aiding and abetting.

5 Neilson, 290 F.Supp.2d at 1134-36.

6 The court expresses no view whether Ted's sons did in fact
7 aid and abet any breach of fiduciary duty by the Successor
8 Trustess. The court must accept Cassel's allegations as true for
9 purposes of his motion to amend. Because Ted's sons have not
10 established that Cassel's proposed amendment is futile the court
11 will grant Cassel's motion for leave to amend the Supplemental
12 Complaint.

13 IV. Conclusion

14 Amended orders are being issued concurrent with this
15 Memorandum Decision reflecting the disposition of Cassel's Partial
16 MSJ, Defendants' MTD, and Cassel's motion to amend the
17 Supplemental Complaint. No judgment is being issued at this time.
18 Cassel has not requested a ruling on punitive or consequential
19 damages or attorneys' fees in his Partial MSJ, but neither have
20 Defendants established that those damages are barred as a matter
21 of law. Those issues, the newly added claim for aiding and
22 abetting breach of trust, and other matters remain to be resolved.

23 The court will hold a status conference on July 2, 2007, at
24 1:30 p.m.

25 ** END OF MEMORANDUM DECISION **

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